IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LIONEL MOHAMED,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION**
v.	)	**No. 03-3197-KHV**
	)	
N.L. CONNER, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM AND ORDER

Lionel Mohamed, an inmate at the United States Penitentiary in Leavenworth, Kansas ("USP Leavenworth"), brings suit *pro se* against Warden N.L. Connor, Associate Warden M. Bezy, Acting Captain W. Odom, Unit Manager T. Jones and Unit Counselor T. Tatum. Under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), plaintiff alleges that defendants failed to protect him from an attack by another inmate in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. This matter comes before the Court on Defendants' Motion To Dismiss, Or, In The Alternative, Motion For Summary Judgment (Doc. #22) filed November 14, 2003. For reasons stated below, the Court sustains defendants' motion and dismisses plaintiff's claims without prejudice for failure to exhaust administrative remedies.

I. Legal Standards

A Rule 12(b)(6) motion should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997) (quoting Conley v. Gibson, 355 U.S.

41, 45-46 (1957)). The Court accepts all well-pleaded factual allegations in the complaint as true and draws all reasonable inferences from those facts in favor of plaintiff. See Shaw v. Valdez, 819 F.2d 965, 968 (10th Cir. 1987). In reviewing the sufficiency of plaintiff's complaint, the issue is not whether plaintiff will prevail, but whether he is entitled to offer evidence to support his claims. See Ruiz v. McDonnell, 299 F.3d 1173, 1181 (10th Cir. 2002) (citations omitted). Although plaintiff need not precisely state each element of his claims, he must plead minimal factual allegations on those material elements that must be proved. See Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

In deciding a Rule 12(b)(6) motion based on exhaustion of administrative remedies under the Prison Litigation Reform Act ("PLRA), 42 U.S.C. § 1997e, the Court may consider administrative materials attached to the prisoner's complaint. See Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1212 (10th Cir. 2003) (citing Oxendine v. Kaplan, 241 F.3d 1272, 1275 (10th Cir. 2001)). If the prisoner does not incorporate by reference or attach the relevant administrative decisions, "a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." Steele, 355 F.3d at 1212 (quoting GFF, 130 F.3d at 1384).

Plaintiff bears the burden of pleading exhaustion. Steele, 355 F.3d at 1209-10. To adequately do so, plaintiff must

> (1) plead his claims with a short and plain statement . . . showing that [he] is entitled to relief, in compliance with Fed.R.Civ.P. 8(a)(2), and (2) attach[] a copy of the applicable administrative dispositions to the complaint, or, in the absence of written documentation, describe with specificity the administrative proceeding and its outcome.

Id. at 1210 (quotations and citations omitted). If plaintiff fails to allege the nature of the administrative proceeding and its outcome, the Court must dismiss the action under Section 1997e(a). Id. at 1211.

The Court affords a *pro se* plaintiff some leniency and must liberally construe the complaint. See Oltremari v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1333 (D. Kan. 1994). While *pro se* complaints are held to less stringent standards than pleadings drafted by lawyers, *pro se* litigants must follow the same procedural rules as other litigants. See Hughes v. Rowe, 449 U.S. 5, 9 (1980); Green v. Dorrell, 969 F.2d 915, 917 (10th Cir. 1992). The Court may not assume the role of advocate for a *pro se* litigant. See Hall, 935 F.2d at 1110.

II. Facts Alleged In Complaint

The complaint alleges the following facts: On June 7, 2002, plaintiff's cell mate, Clinton Chase, physically attacked plaintiff and caused him severe injury. Before the attack, in March and again on June 5, 2002, Chase had informed Unit Counselor Tatum and Unit Manager Jones that if plaintiff was moved back into their cell, or not immediately removed from it, he would severely hurt or kill plaintiff. On June 5, 2002, all defendants knew about Chase's threat. Prison policy and custom required defendants to immediately investigate that threat and take steps to protect plaintiff. Defendants deliberately disregarded the threat, however, and caused plaintiff to suffer severe injury.

III. Plaintiff's Administrative Grievances

To exhaust administrative remedies under the Bureau of Prisons ("BOP") regulations, an inmate must first complete an informal resolution of his complaint. Yousef v. Reno, 254 F.3d 1214, 1220 (10th Cir. 2001); see 28 C.F.R. § 542.13. The regulations permit an inmate to then "seek formal review [from the Warden] of an issue which relates to any aspect of [his] confinement." 28 C.F.R. § 542.10; see 28 C.F.R. § 542.14. An inmate who is not satisfied with the Warden's response may appeal his complaint to the BOP Regional Director. Yousef, 254 F.3d at 1220; see 28 C.F.R. § 542.15(a). "Finally, the

inmate may appeal his case to the General Counsel in the Central Office of the Bureau of Prisons, which is the 'final administrative appeal.'" Garrett v. Hawk, 127 F.3d 1263, 1266 (10th Cir. 1997) (quoting 28 C.F.R. § 542.15(a) (1997)), overruled on other grounds by Booth v. Churner, 532 U.S. 731 (2001).

On August 9, 2002, plaintiff submitted an informal attempt to resolve his complaint. On the form, which requested a brief statement of his complaint, plaintiff wrote the following:

> I would [like] to know why was my life, put in danger, staff members knowing, that inmate Chase #09008058, made a writ[t]en statement, saying he was going to hurt me & the counselor puts him back in the cell.

Informal Attempt To Resolve attached to Plaintiff's Response To Defendants Motion To Dismiss And Memorandum In Support Of And/Or Motion For Summary Judgment ("Plaintiff's Response") (Doc. #24) filed December 9, 2003. On the same form, the counselor wrote that the parties were not able to resolve the complaint at that level. Id. The counselor's name is not legible on the form. See id.

On September 11, 2002, plaintiff sought formal review from the warden. In his request for administrative remedy, plaintiff stated as follows:

> On March 24, 2002, I was in cell A-3/666 with Inmate Chase 09008-058. I was placed in Administrative Detention. While I was in administrative detention, Inmate Chase gave Counselor Tatum a letter in which he advised him that if I were put back in the cell with him upon my release from administrative detention, he would try to kill me.
>
> Mr. Tatum did nothing with this information and I was released from Administrative Detention on June 5, 2002, whereupon I was placed back into cell A-3/666 with Inmate Chase. Two days later, I was assaulted by Chase in the unit TV room and suffered serious physical, psychological and emotional injury. I was left permanently scarred by a weapon in this altercation.
>
> I am seeking two million dollars ($2,000,000) in both compensatory and punitive damages.

Request For Administrative Remedy, Exhibit D to Defendants' Memorandum In Support Of Their Motion To Dismiss, Or In The Alternative, Motion For Summary Judgment ("Defendants' Memorandum") (Doc.

#23) filed November 14, 2003.

On September 23, 2003, the warden denied plaintiff's request, stating that

> [t]he review revealed your cell mate requested a cell change; however, he never indicated to any staff member there was a threat to your safety. Additionally, there is no indication your cell mate voiced any threats to your safety.

Response, Exhibit D to Defendants' Memorandum.

On September 27, 2002, plaintiff filed a regional administrative appeal, repeating allegations identical to those stated in his request to the warden. See Regional Administrative Remedy Appeal, Exhibit D to Defendants' Memorandum. On October 22, 2002, the BOP Regional Director issued a response similar to the warden's response. See Regional Administrative Remedy Appeal Part B – Response, Exhibit D to Defendants' Memorandum.

Plaintiff filed an appeal with the BOP central office. The date of the appeal is not legible. See Central Office Administrative Remedy Appeal, Exhibit D to Defendants' Memorandum. On the appeal form, plaintiff stated as follows:

> On March 24, 2002, I was in cell 666, Unit A-3, with Inmate Chase, #09008-058. I had gotten an incident report and was placed on administrative detention.
>
> While I was in detention Inmate Chase gave Counselor Tatum a letter in which he advised him that if I were put back in the cell with him upon my release from detention, he would try to kill me.
>
> With such information at the counselor's disposal, why was I placed back in cell 666 with Chase? This unprofessional conduct by Counselor Tatum has caused me to be seriously assaulted by Inmate Chase, which is a violation of my Fifth Amendment rights to procedural safe-guard of the due process clause, and equal protection of the law.
>
> Counselor Tatum put me under conditions that posed a substantial risk of serious harm which also violated my Eighth Amendment rights to be free from cruel and unusual punishment and inhumane conditions of confinement. In addition, Counselor Tatum has failed to follow the rules as outlined in CFR and BOP P.S.
>
> As a [result of] neglect of rules and regulations by prison officials I suffered serious physical, psychological and emotional injuries. I was left permanently scarred by a weapon

> in the altercation. Therefore, I am seeking two million dollars ($2,000,000) in both compensatory and punitive damages.

Central Office Administrative Remedy Appeal (emphasis in original), Exhibit D to Defendants' Memorandum.

On January 6, 2003, the central office denied the appeal, stating as follows:

> You do not provide any evidence to support your claim the staff member involved jeopardized your life by assigning you to a cell with an inmate who had stated in a letter that he would kill you if you were assigned to his cell upon your release from the SHU. The other inmate involved requested a cell change but did not inform staff that he would assault you. * * *

Administrative Remedy No. 277610-A1 Part B – Response, Exhibit D to Defendants' Memorandum.

IV. Analysis

In this suit, plaintiff claims that by failing to protect him, defendants violated his rights under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. Defendants seek to dismiss plaintiff's claims because he did not exhaust administrative remedies as to all defendants.[1] Specifically, defendants argue that plaintiff did not exhaust as to Conner, Bezy, Odom and Jones, because he did not mention them in his administrative grievances. Defendants admit that plaintiff exhausted administrative remedies as to Tatum but urge the Court to dismiss the entire "action" because plaintiff did not exhaust with respect to all defendants. See Defendants' Memorandum at 11-12.

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[1] Defendants also seek to dismiss the complaint because (1) plaintiff has not stated a claim against Conner, Bezy and Odom; (2) the judgment in plaintiff's prison disciplinary proceeding bars plaintiff's claims; (3) sovereign immunity bars any official capacity claims; (4) plaintiff does not state a claim for violation of rights under the Fourteenth Amendment; and (5) plaintiff does not state a claim for violation of rights under the Fifth Amendment. In addition, defendants seek summary judgment on plaintiff's claims under the Eighth Amendment. The Court does not reach these arguments because it rules in favor of defendants on the exhaustion issue.

The PLRA, 42 U.S.C. § 1997e, imposes a mandatory exhaustion requirement for inmates who bring suit regarding prison conditions. Specifically, Section 1997e(a) provides that:

> [n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). The Supreme Court has interpreted this language broadly, holding that "prison conditions" encompass "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). The statute applies whenever the prison administrative process could provide some relief, even if it could not provide the money damages which plaintiff demands. See Booth, 532 U.S. at 734; Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002) (prisoner must exhaust "available" remedies even if they appear futile at providing remedy sought). The exhaustion requirement is mandatory; the Court is not authorized to dispense with it. See Beaudry v. Corr. Corp. of Am., 331 F.3d 1164, 1167 n.5 (10th Cir. 2003) (citations omitted).

In Ross v. County of Bernalillo, — F.3d —, No. 02-2337, 2004 WL 902322 (10th Cir. April 28, 2004), the Tenth Circuit found that Section 1997e(a) imposes a "total exhaustion" requirement.[2] Id. at **6-7. Under the total exhaustion rule, the presence of unexhausted claims in plaintiff's complaint requires

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[2] The Tenth Circuit reasoned that such requirement is consistent with the language in Section 1997e(a) and furthers the policies underlying the statute, including (1) encouraging prisoners to make full use of inmate grievance procedures and thus giving prison officials the first opportunity to resolve prisoner complaints; (2) facilitating the creation of an administrative record that would ultimately assist federal courts in addressing prisoners' claims; (3) relieving district courts of the duty to determine whether certain exhausted claims are severable from other unexhausted claims that they are required to dismiss; and (4) avoiding at least some piecemeal litigation. Id. at *7 (citations omitted).

the Court to dismiss the action in its entirety without prejudice. Id. at *6. Thus if plaintiff has not exhausted administrative remedies as to all defendants, the Court must dismiss the entire action without prejudice.

Here, plaintiff clearly did not name Conner, Bezy, Odom and Jones in his administrative grievances. The issue is whether plaintiff can somehow exhaust his claims against those defendants without naming them in the administrative procedure. The Tenth Circuit apparently has not decided whether Section 1997e(a) requires an inmate to name each defendant in the grievance procedure. The Sixth, Seventh and Eleventh Circuits have examined the issue, and reached different conclusions. See Curry v. Scott, 249 F.3d 493, 505 (6th Cir. 2001); Strong v. David, 297 F.3d 646, 649-50 (7th Cir. 2002); Brown v. Sikes, 212 F.3d 1205, 1207-08 (11th Cir. 2000).

In Curry v. Scott, the Sixth Circuit found that Section 1997e(a) requires an inmate to name in his grievance each individual whom the inmate intends to sue. See Curry, 249 F.3d 493 at 505. There, plaintiffs claimed that one corrections officer saw another officer beating them and failed to intervene. Plaintiffs exhausted the administrative process with respect to the officer who beat them, but they did not complain about or mention the officer who witnessed the event. Plaintiffs argued that the Court should allow the claim because (1) prison officials knew the facts and (2) an investigation into their grievance would have revealed the facts. The Sixth Circuit rejected plaintiffs' argument, finding that their claim against the witnessing officer was a separate claim against a separate individual, premised on a separate and independent legal theory. Id. at 505. In doing so, the court reasoned that because plaintiffs did not mention the witness in the grievance procedure, the prison did not know that they had a specific grievance against

him and therefore had no reason to pursue any claim or disciplinary action against him. Id.[3]

In Brown v. Sikes, the Eleventh Circuit applied a more lenient approach, finding that Section 1997e(a) requires an inmate to provide as much relevant information as is reasonably possible in the administrative grievance process. See Brown, 212 F.3d at 1207-08. The Eleventh Circuit reasoned that its ruling furthered the policies behind the exhaustion requirement, which it identified as follows:

> (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating the rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover its own errors; and (7) to avoid the possibility that frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures.

Id. at 1208 (quotations and citations omitted).

In Strong v. David, the Seventh Circuit found that because Section 1997e(a) does not delineate the procedures which prisoners must follow, courts must look to the prison grievance system itself – state law for state prisons and federal administrative law for federal prisons – to determine what an administrative grievance must contain.[4] See Strong, 297 F.3d at 649-50. The Seventh Circuit ruled that where the administrative rules are silent on the issue, a grievance is sufficient if it alerts the prison to the nature of the

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[3] In subsequent opinions, the Sixth Circuit has continued to require that in the grievance procedure, plaintiffs name the specific individuals whom they intend to sue. See, e.g., Adler v. Corr. Med. Servs., No. 02-2496, 2003 WL 22025373, at *2 (6th Cir. Aug. 27, 2003); but see Thomas v. Woolum, 337 F.3d 720, 734 (6th Cir. 2003) (stating in dicta that inmate need not identify each individual by name when identity is unknown).

[4] In this case, the record is silent with respect to whether federal administrative law prescribes rules regarding the content of a prisoner's grievance.

wrong for which the inmate seeks redress. Id. at 650. The Seventh Circuit equated the requirement with notice pleading, stating that "the grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming." Id.; see also Riccardo v. Rausch, 359 F.3d 510, 513 (7th Cir. 2004) (generously construing grievance allegation that "the administration don't do there [sic] job").

On this record, the Court need not decide which approach the Tenth Circuit would follow, because plaintiff has not shown exhaustion under any of the approaches. Under the Sixth Circuit approach, plaintiff's claims fail because he did not name Conner, Bezy, Odom and Jones in the grievance procedure. Under the Eleventh Circuit approach, plaintiff cannot succeed because he has not shown that at the time he filed his administrative grievances, he could not reasonably have known the identity of Conner, Bezy, Odom and Jones or information relating to his claims against them. Under the Seventh Circuit approach, plaintiff's claims fail because he has not shown that his administrative grievances provided reasonable notice of his claims against Conner, Bezy, Odom and Jones.[5] On this record, the Court must dismiss plaintiff's claims without prejudice for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a).

IT IS THEREFORE ORDERED that Defendants' Motion To Dismiss, Or, In The Alternative, Motion For Summary Judgment (Doc. #22) filed November 14, 2003 be and hereby is **SUSTAINED**. Plaintiff's claims are **DISMISSED WITHOUT PREJUDICE** for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a).

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[5] Neither party contends that the BOP has implemented a standard regarding the content of a grievance or the necessary degree of factual particularity, and the Court is aware of none. Therefore, on this record the Seventh Circuit would apply a notice pleading standard. See Strong, 297 F.3d at 650.

Dated this 7th day of May, 2004 at Kansas City, Kansas.

s/ Kathryn H. Vratil
Kathryn H. Vratil
United States District Judge